

1-1975

Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio

Gordon Bermant

Duncan Chappell

Geraldine T. Crockett

M. Daniel Jacobovitch

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Gordon Bermant, Duncan Chappell, Geraldine T. Crockett, and M. Daniel Jacobovitch, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975 (1975).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol26/iss4/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio

By GORDON BERMANT,* DUNCAN CHAPPELL,** GERALDINE T. CROCKETT,† M. -DANIEL JACOUBOVITCH,†† and MARY MCGUIRE†††

The past three years have produced a sustained growth in the use of videotape technology in the judicial process both inside and outside the courtroom. Stimulated in large part by the pioneering work of Judge James L. McCrystal of the Court of Common Pleas, Erie County, Ohio, and now fostered by the active assistance of the National Center for State Courts, a number of jurisdictions in the United States are testing the effectiveness of this new medium in a variety of roles.¹ Probably the most extensive of these roles is the recording of substantial portions of testimony before trial, so that it may be edited by the judge for sustainable objections and then presented in a continuous sequence to a jury.² This procedure has come to be known as prere-

* Coordinator, Behavioral and Social Sciences, Battelle Memorial Institute; Affiliate Professor of Psychology, University of Washington, Seattle, Washington.

** Director, Law and Justice Study Center, Battelle Memorial Institute; Affiliate Associate Professor of Sociology, University of Washington, Seattle, Washington.

† Research Assistant, Behavioral and Social Sciences, Battelle Memorial Institute; Graduate Student, Department of Public Administration, University of Washington, Seattle, Washington.

†† Research Assistant, Behavioral and Social Sciences, Battelle Memorial Institute; Graduate Student, School of Communication, University of Washington, Seattle, Washington.

††† Doctoral Candidate, Department of Psychology, University of Washington, Seattle, Washington.

1. See NATIONAL BUREAU OF STANDARDS, POTENTIAL USES OF COURT RELATED VIDEO RECORDING 11 (1972); Kornblum, *Video Tape in Civil Cases*, 24 HASTINGS L.J. 9 (1972); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DENVER L.J. 463 (1973); McCrystal, *Ohio's First Video Tape Trial*, 45 OHIO B.A.R. 1 (1972); Murray, *Comments on a Video Tape Trial*, 45 OHIO B.A.R. 25 (1972); Watts, *Comments on a Video Tape Trial*, 45 OHIO B.A.R. 51 (1972).

2. Other major uses of the medium, in a legal setting, include recording the ex parte statement of a witness or the reenactment of an event; recording the deposition of a witness which may be used at trial; and recording testimony at trial so an immediate record is available for use in the preparation of an appeal and review by an appellate court. See Kornblum, *Video Tape in Civil Cases*, 24 HASTINGS L.J. 9, 11-12 (1972).

corded videotape trial presentation (PRVTT). Judge McCrystal has conducted more than a dozen such trials since 1971; most have involved condemnation actions. Favorable experiences in Ohio have prompted similar experiments in other settings.

Numerous commentators on the subject of the PRVTT have speculated about the responses of jurors to videotaped testimony. In this article we report on two studies conducted as part of an effort to gather data relevant to some of the concerns that have been expressed in the legal literature on the PRVTT. As a result of the generous cooperation of trial judges and attorneys, the authors were able to survey juror reactions to PRVTTs conducted in California and Ohio. While this report necessarily is limited in scope, we believe that it contains information useful in posing and partially answering some of the many questions raised by the use of videotape technology in the judicial process.

The data we will present are the result of surveys of two groups of PRVTT jurors. The first was the jury that viewed the videotape presentation of *Liggins v. Hanisko*,³ California's first PRVTT, conducted in San Francisco on September 17 and 18, 1973. The second group surveyed was composed of the eighty-three jurors who viewed testimony in fourteen land appropriation PRVTTs⁴ conducted in Erie County, Ohio, during November and the first few days of December 1973. The Ohio trials differed from the California PRVTT in a number of ways which will be discussed in later sections of this paper.⁵

The authors investigating the California trial⁶ were in the courtroom for the viewing of testimony in *Liggins v. Hanisko*. The California jurors' responses to that trial were obtained by means of a self-administered questionnaire, followed by personal interviews conducted by the investigators. This procedure enabled study of the responses of these twelve jurors.

3. Civil No. 637-707 (Super. Ct. San Francisco County, Ca. Sept. 19, 1973).

4. *Ohio v. Walker*, Civil No. 38485 (C.P. Erie County, Ohio 1973); *Ohio v. Kopp*, Civil No. 38477 (C.P. Erie County, Ohio 1973); *Ohio v. Corso*, Civil No. 38478 (C.P. Erie County, Ohio 1973); *Ohio v. Lizzi*, Civil No. 38483 (C.P. Erie County, Ohio 1973); *Ohio v. Corso*, Civil No. 38481 (C.P. Erie County, Ohio 1973); *Ohio v. Balconi*, Civil No. 38484 (C.P. Erie County, Ohio 1973); *Ohio v. DaGiau*, Civil No. 38479 (C.P. Erie County, Ohio 1973); *Ohio v. Corso*, Civil No. 38482 (C.P. Erie County, Ohio 1973); *Ohio v. Miller*, Civil No. 38476 (C.P. Erie County, Ohio 1973); *Ohio v. Brengartner*, Civil No. 38693 (C.P. Erie County, Ohio 1973); *Ohio v. Knoll*, Civil No. 38522 (C.P. Erie County, Ohio 1973); *Ohio v. Jackson*, Civil No. 38632 (C.P. Erie County, Ohio 1973); *Ohio v. Burwell*, Civil No. 38521 (C.P. Erie County, Ohio 1973); *Ohio v. Hargrove*, Civil No. 38480 (C.P. Erie County, Ohio 1973).

5. See text accompanying notes 29-32 *infra*.

6. G. Bermant, D. Chappell, and M. McGuire.

The survey of the Ohio jurors' responses to the PRVTTs was conducted by means of an expanded and revised version of the questionnaire used in the *Liggon*s study. This second survey was conducted entirely through the mail. Because the Ohio survey involved a larger number of participants than the California study, we were able to take a more statistically oriented approach to the data than was possible with the *Liggon*s jury.

Liggons v. Hanisko: The Circumstances of the Trial

*Liggon*s v. *Hanisko* involved a set of circumstances commonly found in motor vehicle accident litigation. Following a two-car collision at a signal-controlled intersection in San Francisco, the plaintiff, a passenger in one of the cars involved in the accident, brought suit for \$50,000 against the driver of the other car. The major point of controversy centered on which driver had proceeded through the intersection against a red or amber light. Experience suggests that in such cases juries find about equally often for plaintiff and defendant.⁷ The jury in fact ultimately found for the defendant in *Liggon*s v. *Hanisko*.

Selection of *Liggon*s v. *Hanisko* for the videotape experiment was recommended by the defendant's attorney, Mr. Joseph W. Rogers, who had become keenly interested in the technology through his work at Hastings College of the Law in San Francisco. The college possesses a courtroom serviced by videotape equipment as a test and training site for its law students. Following an agreement with the National Center for State Courts to assist with technical aspects of the trial, Rogers set about finding a suitable case to videotape for courtroom presentation, and his search led eventually to *Liggon*s v. *Hanisko*.

For those who may consider trying similar experiments elsewhere, Rogers's own comments on this search for a suitable case are of interest:

I don't think you will find many cases where both the plaintiff and the plaintiff's attorney, and the defendant and his attorney, and the defendant's insurance company, are all willing to agree to videotape the trial . . . This wasn't the first case that I tried to get for this purpose. I was contacted by the National Center for State Courts and told that I could choose my case so, of course, I chose my plaintiff's attorney, too, and that wasn't my first choice. But the other people weren't able to get the consent of their clients . . . Unless you have a new rule of court which makes [videotaping] not subject to the veto of either party (as

7. 3 JURY VERDICT RESEARCH, INC., PERSONAL INJURY VALUATION HANDBOOKS, LIABILITY RECOVERY PROBABILITIES 26a-27 (1970).

exists in the state of Ohio), you are not going to get very extensive use of this technique.⁸

Having agreed to take part in the experiment, the plaintiff's and defendant's attorneys commenced preparation of a detailed stipulation for the prerecording of the testimony and its use at the trial. In summary, this stipulation provided for the following matters:⁹

1. All the trial testimony in the action was to be prerecorded on tape in the absence of the judge and court reporter.

2. Only the testimony was to be prerecorded; jury selection, opening statements, arguments of counsel, and instructions to the jury were to be presented in the usual manner.

3. Objections to questions put to witnesses would not be made until after the answer had been given. Grounds for an objection were to be stated, and when an objection was made it was to be noted by the use of a digital computer or equivalent method for ease of subsequent reference. No objections other than those made during the prerecording process were to be made at any later time, and objections to documents or other physical evidence were to be made during the prerecording; if not made then, they were to be deemed waived.

4. Following the recording, attorneys for each party were to receive an audio cassette of the entire testimony.

5. Not less than twenty days before trial, the attorney for each party was to file and serve a list of digital references to those objections that he had made during the prerecording and that he still wished to pursue prior to the presentation of the recording to the jury. Reasons were to be given in brief why the objection should be sustained. No less than ten days before trial, the attorney for each party was to serve and file a statement of his reasons for resisting each objection listed by his adversary. All objections not handled in this manner were to be deemed waived.

6. Prior to the showing of the testimony to the jury, the trial judge was to rule on the objections referred to in the statements of the parties. An edited copy of the original recording was to be prepared for presentation to the jury; the edited copy would not include material and answers to which objections were sustained.

7. The original recording was to be turned over to the county

8. Interview with Joseph W. Rogers, Attorney of Record for Defendant, in San Francisco, Sept. 28, 1973 [hereinafter cited as Rogers Interview].

9. Stipulation for Pre-Recording of Testimony on Video Tape and Use Thereof at Trial, *Liggons v. Hanisko*, Civil No. 637-707 (Super. Ct. San Francisco County, Ca. Sept. 19, 1973).

clerk for custody and safekeeping until the time of the trial. After trial, the clerk would retain custody of both the original and edited copies of the recording until the time for appeal had expired. In the event of an appeal, a written transcript would be prepared from both the original and edited copies for use by the appellate court as it saw fit.

8. The county clerk would deputize an employee of the National Center for State Courts as a temporary deputy county clerk for the purpose of administering oaths to witnesses at the recording of the testimony prior to trial.

Stipulation 3, regarding the timing of objections, provided certain problems for the participating attorneys, as Rogers indicated:

Now we had the stipulation that objections would be reserved until after the answer was given. This idea was given to us by Judge McCrystal. There is a problem with doing that when you are in the habit of objecting after the question. [But] we caught on after the first few slips. We would wait, even though we knew the question was objectionable, and would listen to the answer. It did flow more smoothly that way, and if you do find that the answer doesn't hurt you, fine, you don't object. In fact, the answer could even help and maybe the guy is sorry he even asked it. [In] any event our stipulation was to the effect that before the tape was to be shown, the two attorneys would attempt to stipulate for as many rulings on the propriety of the objections as they could, and only those they couldn't agree on would they submit to the judge. That means you have got to go through and listen to the entire tape or read a transcript of it.

You talk about time—when you consider the amount of time it took to present the case, then go through the transcript, listen, and then haggle over what's going to be done with those objections and prepare your argument, which of course you have to do all over again because it's been a while since the actual testimony was taken, and be present during the showing of the tape, I would estimate that I spent at least twice the time that I would have on an ordinary case. Now this is a function of the learning process.¹⁰

The other stipulations made by the two attorneys as part of this "learning process" apparently worked well. As a result of their extensive review of the testimony the attorneys reached agreement on many of their objections without consulting the trial judge.

Unavoidable delays prevented preparation of a separate edited trial tape. Hence an ad hoc method of bypassing objectionable material was devised for use during the trial. Referring to objectionable material by digital reference point from the tape, the technician stopped the machine, moved it forward at fast speed through the ob-

10. See Rogers Interview, *supra* note 8.

jectionable portion, then returned it to the normal speed. This procedure resulted in a rather amusing and potentially confusing spectacle of the videotape trial participants performing high-speed "slapstick" antics at certain points in the trial. For some of the jurors, at least, these antics apparently provided a few moments of relief from the serious task of hearing seven hours of videotaped testimony.

The Courtroom Arrangements

Selection of the jury in *Liggon v. Hanisko* occupied more than one hour on Monday morning, September 17, 1973. The judge, plaintiff, and defendant were present with counsel during the selection process and throughout the trial itself. Sitting as the trial judge, the Honorable Robert F. Kane of the Court of Appeal viewed the videotaped testimony from an eleven inch television monitor on his bench. The jurors viewed the testimony through two twenty-three inch television monitors facing them in the jury box. A third twenty-three inch monitor was placed for the attorneys and spectators. The video technician sat to the left of the judge, below the level of the bench.

In the course of examining the qualifications of the jurors to serve in *Liggon v. Hanisko*, Judge Kane noted that

perhaps [a] rather unusual procedure will take place in this case. The testimony in this case has previously been taken by means of television videotape. All of the witnesses have testified. That testimony will be presented in this trial in that form; that is, over a television screen, so that there will not be any live witnesses who testify.

Let me just ask from that basic, very brief description, is there anyone among you who feels that [videotape] would present any problem or obstacle to you to sit as a juror and judge the case, the fact that you would be receiving the evidence in the form of video television rather than the live appearance of the individual witnesses? If there is anyone who has any feeling of hesitation about that, would you please let me know by raising your hand?¹¹

No one raised his hand during this preliminary inquiry. After several potential jurors had been stood down for various reasons, however, an alternative juror, an architect by profession, posed the following question concerning the use of videotaped testimony:

This [videotaping] is something that is new to me, as I assume it is to most. I am not quite sure whether I could accept videotaped testimony or not. My concern is the fact that in most areas of human communication, the physical presence of the person

11. Record at 3-4, *Liggon v. Hanisko*, Civil No. 637-707 (Super. Ct. San Francisco County, Ca. Sept. 19, 1973) (Jury Selection).

making the testimony, or talking or carrying on communication in any form, is I feel, extremely important. I am not sure how the testimony is taken, how it is presented, and how it would in fact bear on this particular case. It is just a point of confusion and interest to me.¹²

Judge Kane responded to the juror's comment:

Well, let me say that the taking of the testimony has been accomplished with all of the legal requirements for the taking of testimony. I might give you an analogy: you probably have heard of the term depositions which has been in vogue in legal circles for years . . . and testimony in that form, although not taken in court, is entitled to the same weight, the same test, as testimony in open court. So it isn't really anything new except perhaps as for the form in which it is taken.

It is a somewhat new experience, I believe, in California that we are embarking on here; however, it has been done in other states so there is some precedent for the technique. What I am interested in is whether or not you feel that the mere fact that the testimony is going to come in this form would cause you to hesitate, or do you feel that it is going to preclude you from being the kind of juror that you probably anticipated that you would be?¹³

Ultimately the architect decided that he would be able to fulfill his role as a juror, and the doubts he expressed were not found sufficient to have him excluded. He along with three other men and eight women were sworn in as jurors to try the case. The composition of the jury appears generally representative of those persons normally serving in this role in the courts of San Francisco.¹⁴

The Trial

The trial itself consumed the equivalent of two full court days. The opening statements by both counsel directly followed the swearing-in of the jury members. The videotapes were shown to the jury on the afternoons of Monday, September 17, and Tuesday, September 18, 1973. Closing statements by counsel and the judge's instructions to the jury took place on the afternoon of Wednesday, September 19. The jury returned its verdict the same afternoon after deliberating for forty minutes.

In an interview conducted after the trial, Judge Kane observed that *Liggins v. Hanisko* had initially been scheduled for four days of trial, on the assumption that the proceedings would be in person. From his perspective, the time-saving aspect was the biggest advantage of videotape technique. Time was saved, he felt,

12. *Id.* at 30-31.

13. *Id.* at 30.

14. See Table I *infra*.

for just about everybody connected with the case—the court certainly; the witnesses; the parties; jurors We had no interruptions for what would have involved the jury waiting around while the judge was out making rulings on admissibility of evidence. We had no problem waiting for witnesses, the scheduling of which you know is a fact of life, particularly with regard to expert witnesses. So I don't think there was any question about it that its major advantage is the economy on time.¹⁵

Pursuing the judge's remarks, the authors inquired whether the judge's own time saving was not, in part, the product of prior agreements reached between the two attorneys concerning the objectionable material on the tape. In this trial, both attorneys were so interested in setting a precedent that they were, perhaps, more cooperative than would ordinarily be the case. Judge Kane partially agreed:

I can see the point you are making and certainly there is some valid basis for it. Of course, this particular case, like many cases of this type, does not leave much room for contentiousness. Sure there is a dispute as to the question of fact, but it isn't the kind of case where the lawyers are really fighting to keep evidence in or out. *A* saw it one way and *B* saw it another way and then there were other areas where the lawyers would try to develop evidence that might be persuasive to the jury to believe *A* rather than *B*.¹⁶

The Jurors' Reactions to Videotape

The jurors' reactions to the televised trial presentation were tested by means of a short, self-administered questionnaire, followed later by personal interviews, usually in the juror's own home. All jurors were contacted, and they responded either to the questionnaire or in the interview, or both. Questionnaires were gathered from nine jurors and interviews obtained from ten. Interviews averaged about forty-five minutes in length and were taped with consent. The questions, both written and verbal, addressed three main areas: (1) juror background; (2) reactions to the technical aspects of the videotape presentation, and (3) impressions of the fairness or justice of the procedure.

Table I lists briefly the sex and background of the twelve jurors.

Table I
JURORS FROM LIGGONS v. HANISKO CASE

Juror	Sex and Occupation
1	Female, clerk at bank.

15. Interview with the Honorable Robert F. Kane, Justice of the California Court of Appeal, in San Francisco, Sept. 28, 1973.

16. *Id.*

- 2 Female, secretary to vice president of credit department in large bank.
- 3 Female, housewife.
- 4 Female, keypunch operator for large corporation.
- 5 Female, secretary working in an investment firm.
6. Male, working for government in the navy shipyard.
- 7 Female, retired insurance company employee.
- 8 Female, self-employed—owns ranch property which she leases.
- 9 Male, project engineer, employed by a construction firm. Merchandising analyst.
- 10 Male, architect.
- 11 Male, unemployed.
- 12 Female, high school English teacher.

Reactions to Technique and Technology

Jurors were asked whether they could see and hear the television presentation clearly at all times during the trial. With certain qualifications, all said they could. The greatest difficulty was apparently in viewing diagrams of the scene of the accident. These diagrams, which were not professionally prepared television graphics, were often obscured by witnesses' noting points of importance on them with markers or by studio lighting that faded them into oblivion. According to one juror, "there were a couple of times when the light was a little too bright on the exhibits. I think the problem was that whoever prepared the exhibits was not aware of how they would come out on television. They were using blue ink and that was a little too soft."¹⁷ Defense attorney Rogers made a similar comment:

Getting to the diagram situation, I think it is a good illustration of perhaps some unfamiliarity with the technology because if you were looking at a professional television production, you would have a diagram done by some artist who would have scaled it down. You would probably have models that clamped on and a whose host of things like that which would very quickly cut down on trial time and, I think, alleviate some of the boredom of drawing spidery diagrams which you couldn't see most of the time.¹⁸

We also questioned jurors about the camera work and studio setting used during the presentation. To keep the recording as balanced and noncontentious as possible, Mr. F. J. Taillefer, the videotape systems consultant supplied by the National Center for State Courts,

17. Interview with Juror 12, in San Francisco, Sept. 28, 1973 [hereinafter cited as Juror 12 Interview]. To preserve their anonymity, jurors are identified by number only in this article.

18. See Rogers Interview, *supra* note 8.

used only one camera throughout most of the trial. The studio set consisted of a raised platform and bench, rather like that found on a normal television panel or news program, with defense attorney Rogers sitting on the right facing the camera and the plaintiff's attorney, Mr. Lucius A. Cooper, on the left. Between them sat the witness whose testimony was being recorded.

The visual field alternated from long shots of all three participants to closeups of witnesses responding to questions. These movements were always measured in pace; zoom camera techniques were not used. Although these camera techniques and studio sets were obviously not designed for exhilarating viewing, juror response to them was mainly favorable. For example, one juror remarked that "the coverage itself was really good considering . . . I won't say it was done by amateurs but it was not exactly the most slick. But it was adequate certainly. When they needed to get close they got close, and when they needed a long shot, they got it."¹⁹

We inquired whether jurors would wish to have trial presentations in color rather than in black and white. Only two jurors said they felt color would have been preferable. One of these, familiar with photographic techniques, observed that without excellent lighting in the studio the faces of black persons could become indistinguishable with a dark background. She felt that on several occasions when the camera focused in on the black plaintiff, Mrs. Liggon, and some of her witnesses, also black, their faces were obscured. Among those jurors who were content with black and white television, several felt this was an advantage because it permitted a less sensational presentation of evidence than would have been the case with color.

We also questioned jurors about their reactions to viewing seven hours of television in a courtroom. In particular, we asked, would they "prefer to watch the television presentation in a room other than the courtroom?" All but one felt they would not. While acknowledging that in their normal television viewing at home they would have been able to walk around, smoke, and take other forms of rest, usually during commercial breaks, the consensus of the group was that this viewing was different simply because it was in a courtroom: the dignity of the court added a significant and important element to the event. As one juror put it:

Well, you are supposed to give undivided attention to the testimony that is being given to the case that you are looking at and hearing. And if you got up to get a glass of water I am sure

19. Interview with Juror 5, in San Francisco, Sept. 28, 1973.

you would miss something, whether or not it would be important, but I am sure you would miss something. You are still in a courtroom, even though it's videotape. It is still a court so I don't think that [being in another room] would be really correct.²⁰

Despite this feeling about the desirability of viewing the videotape in the courtroom, more than half of the jury members expressed a desire for more court-appointed breaks in the presentation.

What got me was sitting watching television and you sit there for an hour at a time, and I was thinking that if we were in a room watching it and could get up and get a glass of water or something and move around a little bit more—it would have been preferable. Just sitting there for that length of time; well, one of the men said, "Gee, I wish we could at least sit here and knit or something" but you just sit there.²¹

Another more cost-conscious member of the jury felt that the jury was there to do a job and that:

we are paying to support the court system and certainly any judge that keeps you there a little bit longer or shortens your lunch is to the taxpayer's benefit. If you look at it like that, although being on a jury and sitting there that long is hard—the case was such that the nature of the case did not allow much entertainment and breaks.²²

In sum, the general reaction of jurors in *Liggons v. Hanisko* to the technical aspects of videotape presentation was favorable. For those contemplating the future use of the medium in a litigation setting, we recommend that professional advice be sought on presentation of graphic material on camera. The physical comfort and needs of jurors viewing videotape testimony also requires consideration; more frequent breaks in the testimony may be desirable. These issues apart, jurors in *Liggons v. Hanisko* indicated receptivity to the use of this familiar technology in the courtroom setting. The role of juror is far less familiar than the role of television viewer. What the bench and bar perceive as a novel experiment, the juror may perceive as the extension of a very ordinary practice into a novel location. Some of our questions dealt specifically with this issue.

Reactions to the Setting

We cited earlier the doubts expressed by one juror, an architect, about the use of videotape testimony. How did this juror feel after the trial?

The reservations I had before were dispelled by the presentation

20. *Id.*

21. Interview with Juror 2, in San Francisco, Sept. 28, 1973.

22. Juror 12 Interview, *supra* note 17.

itself. I think [videotape testimony] is a tremendous and valuable tool . . . I think there is virtually no limit as to what they could do with this sort of thing. For instance, if someone had gone out with a television camera and videotaped the intersection in dimension, so to speak, they could instead of admitting photographs which were hard to see in this case, just splice this right into the tape and they would have a panorama of the whole intersection.²³

Despite his enthusiastic endorsement of the medium, this same juror remarked on the importance, for him, of the physical presence in the courtroom of both the plaintiff and defendant throughout the videotape presentation.

When I watched something where I felt that I didn't quite think that they were telling the truth, whether they were really uncertain, I would look at them and see what sort of defensive posture they were taking in the situation. I'm not a great student at this sort of thing but I recognize certain things that people do when they get themselves in a lie or in a defensive mood so to speak. When you cross your arms in front of you you are sort of in a defensive mood . . . just like a football coach on the sidelines sometimes when his team is behind. When his team's ahead he's standing. It happens every time.²⁴

In general, jurors exhibited few strong positive or negative opinions about the setting of videotape and litigants simultaneously in the courtroom. This point is interesting in part because in those jurisdictions where attorneys, litigants, and the judge are not present during videotaped trial portions, the jurors likewise indicate no particularly strong positive or negative response. It seems that the perceived authority of the court is per se sufficient to convince a large percentage of jurors that deviations from expected procedure are not objectionable.

Responses to the "Tone" of the Videotape Presentation

The "impersonal" quality of the televised presentation troubled a number of the jurors. One who was highly critical of the entire system of justice as well as the use of videotape, commented:

Feeling [for the witnesses] was definitely completely lost. I didn't have any more feeling for either one of those people . . . just of the words that they had said . . . which a friend of mine was arguing for, saying, well that's good, you weren't influenced by their personalities. On the other hand, their personalities are why they are the people they are. It's really hard to tell where you

23. Interview with Juror 10, in San Francisco, Sept. 28, 1973.

24. *Id.* This sort of amateur psychologizing by jury members is itself an interesting and so far neglected field of psycholegal research.

draw the line in that kind of situation and what on TV should be acceptable and what should not be.²⁵

Or as another juror put it, "It's just very hard to explain [T]he human factor is needed [I]t's just [as] if all of a sudden we are all becoming numbers" ²⁶

On the other hand, several jurors viewed the perceived impersonality of the videotape presentation as an advantage. These people said they found fewer distractions watching television than participating in a live trial. Indeed, one juror became so involved in the medium that she said she had to keep reminding herself that this was a real trial and not merely another episode of a popular television program involving lawyers. She added, however, that the commercial program was far more exciting.

The lack of excitement in the testimony given during *Liggon v. Hanisko* was reflected in the comments of most jurors. A majority felt that the witnesses and attorneys were quite relaxed on camera.

I thought that everyone looked as if it was just an everyday occurrence. More of the witnesses were very much at ease compared to the ones I've seen in the courtroom. They are much more nervous.²⁷

This same juror considered this relaxed atmosphere a disadvantage, believing that the credibility and veracity of witnesses' testimony would be easier to assess if their general demeanor and responses could be viewed first hand in the courtroom. Other jurors, agreeing that the witnesses appeared at ease, believed the relaxation to be advantageous. Defense attorney Rogers made the following point:

The implied assumption is that nervousness assists the finder of fact in ferreting out the truth. I think it's just the opposite. And therefore the relaxation of the attorneys and the witnesses, too, on videotape is more likely to be more conducive to an ultimately just result than a live system. For example, the lawyers can work in complete relaxation and their opponent cannot do anything that is going to irretrievably injure the case. Prejudicial misconduct, for example . . . simply did not occur because if it is misconduct it's going to be edited out of the tape before it is shown to the jury. So the lawyers can be more relaxed and the witnesses strangely are more relaxed in front of a camera after the first minute or two than they are in front of twelve people.²⁸

The divergence in views among jurors and an attorney calls attention to two interesting psycho-legal issues. First, it demonstrates that

25. Juror 12 Interview, *supra* note 17.

26. Interview with Juror 7, in San Francisco, Sept. 28, 1973.

27. Interview with Juror 9, in San Francisco, Sept. 28, 1973.

28. Rogers Interview, *supra* note 8.

all participants in the trial process are interpreting experiences in the courtroom according to their own past histories and more or less formalized psychological theories. In this case, of course, the attorney's word must weigh heavily when he describes his and his adversary's attitudes toward their videotaped performances. A policymaker attempting to frame guidelines for possible legislation regarding courtroom use of videotape will certainly wish to take these opinions strongly into account. But it would be unwise to count such statements as *more* than opinions until vigorous experimental work is done that can validate or refute them. Behavioral scientists must move toward this goal in their efforts to aid policymakers and officers of the court in making beneficial changes in trial processes and management.

The second issue is highlighted by the disagreement between jurors on whether the apparent relaxation of videotaped witnesses and attorneys is advantageous or disadvantageous in the pursuit of a fair trial. Operational definitions of justice or fairness are elusive in this context because absolute standards are lacking. Moreover, it is important to emphasize that all technological courtroom innovations must not only *be* fair to all parties, they must *appear* fair to the parties and the jurors, if confidence in the system is to be maintained. From the information collected in this case we found that most jurors did not react negatively to the videotaped presentation. But since some jurors did so react, careful thought should be given to the causes of these reactions and efforts made to eliminate them where feasible.

Erie County, Ohio, PRVTT Juror Survey

During November and the first few days of December 1973, fourteen land appropriation (condemnation) cases filed by the Ohio Director of Highways were presented as PRVTTs to jurors in the court of Judge James L. McCrystal, Erie County, Ohio.²⁹ The Ohio trials differed from *Liggon v. Hanisko* in several noteworthy respects. *Liggon v. Hanisko* was the first case in California history to present almost the entire trial to the jury on videotape, while the fourteen land appropriation cases tried in Erie County had been preceded by two years' experience with the PRVTT in the state of Ohio.³⁰ Whereas *Liggon v. Hanisko* was prepared as a PRVTT pursuant to a stipula-

29. Cases cited note 4 *supra*.

30. *E.g.*, State v. McMillon, 35 Ohio App. 2d 234, 301 N.E.2d 882 (1973); Swain v. Norfolk & Western Ry., Civ. No. 39494 (C.P. Erie County, Ohio, Jan. 24-25, 1973); State v. Coleman, Civ. No. 72-4-426 (C.P. Summit County, Ohio, Aug. 1, 1972); Gedeon v. Lane, Civ. No. 72-3-705 (C.P. Summit County, Ohio, Aug. 1, 1973); McCall v. Clemens, Civ. No. 39301 (C.P. Erie County, Ohio, Nov. 18, 1971).

tion of the parties, the Ohio cases were prepared pursuant to Ohio Civil Procedure Rule 40, which permits all of the testimony "and such other evidence as may be appropriate to be presented at the trial of a civil action by videotape."³¹ While the presiding judge at *Liggons v. Hanisko* was present during the jury viewing of testimony, Judge McCrystal was not present for the jury viewing in any of the Ohio cases, several of which were tried simultaneously.³²

The Survey

In November 1973, Judge McCrystal contacted the authors concerning the possibility of conducting a survey of the response to PRVTTs of the jurors in the Erie County land appropriation cases. The data presented below are the outcome of the survey that resulted from Judge McCrystal's inquiry.

The juror's reactions to PRVTTs were elicited by means of a revised version of the questionnaire used in the *Liggons v. Hanisko* study.³³ The self-administered questionnaire, accompanied by two cover letters (one written by Judge McCrystal³⁴ and one written by the

31. OHIO R. CIV. P. 40.

32. In fact, at the time the jury was viewing the testimony in one of the trials, Judge McCrystal was presiding over a conventional personal injury trial in another courtroom.

33. The authors wish to thank Herman Mitchell of the University of Washington Dep't of Psychology for his work on the revision of the questionnaire.

34. "Dear Citizen:

"Recently you were called upon to perform one of the most time-honored and cherished duties of any citizen of a democracy—serving as a juror. Your participation as a juror is appreciated not only by Judge McCrystal, but many others who are following with interest the innovation of video taped trial procedures.

"We would like to call upon your kindness to assist us in our evaluation of this new legal procedure. Attached to this letter you will find a questionnaire attempting to assess your reactions to the video taped trial for which you served as a juror. As you know, this procedure is new and naturally has not been completely perfected. Improvements in this procedure can only be made by honest and accurate information from those who have experienced this new procedure as a trial juror.

"Please do not put your name on the questionnaire. We have replaced personal identification with a coded number known only to the few researchers involved with evaluating this procedure. As soon as we can determine how complete our information is for the several trials being evaluated, even this coded number will be dropped. At no time will your individual responses be tied to your name, nor will individual data be available to any person. We have taken these precautions not because any question in this questionnaire is embarrassing or personal, but rather to help you feel perfectly at ease so that you can respond openly and honestly. Please feel free to make additional comments about any particular questions or your experience as a juror in general—these comments would be most helpful.

"Your assistance with this evaluation will help not only Judge McCrystal and others interested in video taped trial innovations, but will also contribute to the progress and improvement of the American legal system.

principal investigators),³⁵ were mailed to the eighty-three jurors who had viewed the testimony. The questionnaire is set forth in the appendix to this article.

Of the eighty-three questionnaires sent to the Erie County jurors, seventy-six were completed and returned. This return rate of 91 percent is very high for any sort of questionnaire work, and suggests a larger than average degree of compliance on the part of those persons in regard to court-related matters.

The Jurors

The basic demographic characteristics of the seventy-six jurors who completed and returned the survey questionnaire were as follows:

1. Fifty-five percent were male; 45 percent female.
2. The median age of the jurors responding was forty-seven years.
3. Ninety-five percent of the jurors were employed in or out of the home; the remaining 5 percent were retired or unemployed. Employed women were predominantly housewives or secretaries; employed males were predominantly semiskilled or unskilled workers; the remainder were distributed among the professions: teaching, management, etc.
4. Thirty-two percent of the jurors responding had previously served jury duty; most of these had served more than five years before. Two percent served in more than one of the land appropriation PRVTs.

Reactions to Technique and Technology

Overall, the jurors responded favorably to the camera work, the backdrop shown on the monitor screen, and the conditions under which they viewed the PRVTs.

All reported always or usually being able to see clearly. Problems reported typically concerned glare on the screen. Eighty-two percent were either neutral or positive with regard to the quality of the

"We thank you sincerely for your kind consideration and assistance in this project.

"Sincerely yours, /s/ Gordon Bermant, Coordinator, Behavioral & Social Sciences, Battelle Memorial Institute; Duncan Chappell, Director, Battelle Law & Justice Study Center; Herman Mitchell, Ass't Professor of Psychology, University of Washington."

35. "Dear Juror:

"As I have previously indicated to you, the Battelle Seattle Research Center would appreciate your replying to the enclosed questionnaire.

"Sincerely yours, /s/ James L. McCrystal."

camera work. Suggestions given for improvement were not systematic in any sense. The largest single category of suggested changes called for increased use of close-ups.

With regard to the backdrop shown on the screen, 90 percent of the jurors were neutral or positive. Twenty-one percent expressed a preference for the use of color television.

Ninety-two percent were neutral or favorable with regard to viewing the PRVTT in the courtroom as opposed to a special viewing room.

Jurors' Estimates of Their Ability to Concentrate on the Videotaped Proceedings

Depending on the context in which the question arose, somewhere between 63 and 70 percent of the jurors believed it was easier for them to concentrate on the videotape presentation than it would have been on live proceedings. An interpretation of this finding presents difficulties, however, because more than two-thirds of the jurors had no prior jury experience, and those with such experience had only served much earlier.

Twenty percent of the jurors surveyed reported themselves distracted at least slightly by people moving in and out of the courtroom.

General Responses to the Videotape Medium

The Ohio jurors expressed generally favorable impressions concerning the use of videotape for the presentation of the trials in which they participated. Whenever jurors claimed that there were significant differences between videotaped and live trials, the differences were perceived as advantages. It was felt, for the most part, that videotaped trials were less confusing, less emotionally involving, and legally more sound (*e.g.*, with respect to inadmissible evidence).

Seventy-six percent of the jurors indicated they would choose videotape for a civil trial in which they were litigants. The most frequently cited reasons were increased "relaxation" and decreased confusion. By contrast, 43 percent indicated they would choose videotape for a criminal trial in which they were defendants. Again, most of these did so on the grounds of "relaxation"; *i.e.*, less tension in the proceedings. Those who opted for live trials did so predominantly on the grounds that the jury would be easier to influence. This position is consistent with the view that jurors respond to videotape as a medium wherein they are less influenced by personal factors than they would be in live settings.

Somewhat deeper insight into the views of the jurors was gained by cross-tabulating some of the key variables and responses. We were particularly interested to discover relationships between choice of videotape in hypothetical civil and/or criminal proceedings and other responses or juror characteristics. Analysis of the cross-tabulations of answers against the distribution of answers to questions 20 and 21 provided the relevant information.³⁶

In regard to the choice of videotape or live trial presentation in a criminal case, there was a clear relationship with juror age: younger jurors were much less inclined to choose videotape than older jurors. Thus in response to question 21—"If you were an accused in a criminal case, which form of trial would you choose,"—26 percent of the jurors under forty years of age chose videotape while 65 percent of the jurors over forty years of age chose videotape. A similar effect was found in relation to choice of medium in civil trials, even though there was a greater overall tendency for jurors to choose videotape. Thus 24 percent of the younger jurors explicitly chose "live" in response to question 20, while only 11 percent of the older jurors did so. Differences with regard to age were also found on some of the questions regarding ease of concentration and degree of interest in the videotape proceedings. Although not as striking as the differences found in preference in a criminal trial, there was a tendency for older jurors to be more positive about videotape, or conversely for younger jurors to be more positive about live trial presentations.

Some Conclusions

The data presented above provide a tentative basis for discussion and evaluation of juror reactions to the PRVTT. A full appreciation of the similarity of the results obtained from the two groups of jurors surveyed might best be obtained by first reviewing some of the differences between the presentations viewed by the California and Ohio jurors, respectively.

The California jurors were viewing the results of their state's first major venture into courtroom videotape use; the Ohio jurors were viewing a series of PRVTTs prepared in a state that had accumulated experience with the medium in a half-dozen previous cases spanning a two-year period. The judge, plaintiff, and defendant were present with counsel throughout the viewing of testimony in *Liggons v. Hanisko*; the principal parties were often out of the courtroom during the

36. See Appendix *infra*.

presentation of the Ohio PRVTTs. The camera work in the California trial was different from that employed in the Ohio PRVTTs: the *Liggons* presentation was recorded using mostly medium and long shots; the Ohio PRVTTs made more use of close-ups, sometimes combining these into split-screen images.

We suggested earlier that the perceived authority of the court per se was sufficient to convince a large percentage of jurors that deviations from the expected procedure are unobjectionable. This assertion was verified to some extent by the similarities between the responses of the California and the Ohio jurors, particularly in the light of the differences between the respective presentations.

The responses of both groups were generally favorable to PRVTT. Individuals who as potential jurors were sufficiently favorable or neutral about PRVTTs to avoid elimination on voir dire did not turn against the PRVTT subsequently. Unfortunately, we have no data concerning how many, if any, jurors were stood down in the Ohio trials on the basis of antivideotape feeling; there were none in California. In the *Liggons* survey, there was even an instance of a juror whose initial doubts about the use of videotape testimony were dispelled by the presentation he viewed, and who actually came away from the trial enthusiastic about the possibilities he believed the medium affords.

Both groups of jurors expressed the feeling that there were significant differences between live and videotape trials. Both considered some of the differences as advantages of videotaped over live presentations (e.g., the "relaxed" atmosphere apparent in PRVTTs). A majority of both groups indicated that they would choose videotape for a civil trial in which they were litigants. A majority of both (though a small one in the Ohio study) indicated indifference or opposition to the use of videotape testimony in criminal trials. The tendency to opt for videotape was greater among older Ohio jurors than among younger ones. This suggests a hypothesis that persons who have grown up with commercial television are less positive about its application in court trials, particularly when the stakes are as high as personal involvement in a criminal trial.

Technical shortcomings in the quality of the videotaping and the circumstances of presentation were perceived and reported by both groups of jurors. The *Liggons* jurors had difficulty distinguishing graphics on their monitor screens and expressed a desire for more court-appointed breaks in the presentation. The Ohio jurors suggested increased use of close-ups. Twenty percent of the Ohio groups indicated that they were distracted, at least slightly, by the

movement of people in and out of the courtroom in which the PRVTTs were viewed. Both groups were congenial to viewing the PRVTTs in a courtroom. Neither group expressed a preference for color videotape.

The Advent of Videotape: Some Issues Without Answers

Perhaps the most fundamental issue is the differential impact, if any, of live versus videotaped trial testimony upon jury decision making. Time and again in the jurors' responses there appears a more or less explicit belief that there is a difference in the outcome of a trial decisionmaking process produced by live versus taped testimony. This belief was apparent when we asked whether they would favor use of videotape testimony in criminal trials. While 76 percent of the Ohio jurors reported they would opt for videotape in a civil case in which they were litigants, only 43 percent indicated they would choose videotape for a criminal trial in which they were defendants. The California jurors' opposition to the use of PRVTTs for criminal trials was close to unanimous. They expressed the view that when the liberty of the accused was at stake, the courtroom drama should be played to a live audience by a live company of actors. As one juror stated:

It is strictly a gut reaction on my part because I simply feel that because of the seriousness of a criminal trial, absolutely every word that is spoken and absolutely every emotion should be observed personally. If I thought about that for awhile, I know it doesn't jive with what I'm saying about a civil trial—but . . . ?³⁷

Or as another juror said, hesitantly, "[In a criminal case,] eye to eye contact . . . how you speak and everything else counts, especially if it's murder."³⁸

Why and how does eye to eye contact, and/or similar live observations, count in a criminal trial? Or in a civil case, for that matter? Is the liberty of the defendant in some way better protected by jurors who can scrutinize live rather than televised testimony? Does one side of the adversarial process tend to benefit more than the other by the introduction of videotape?

We believe that the legal profession should begin to develop guidelines and rules, based on field research, for the utilization of videotape. Considerations should include not only the technical aspects of taping but also the more thorny qualitative matters discussed above. The impact of this new medium will be felt at all levels of legal prac-

37. Interview with Juror 10, in San Francisco, Sept. 28, 1973.

38. Interviews with Juror 8, in San Francisco, Sept. 28, 1973.

tice once it gains a firm foothold, and indications are that it is well on its way.

In the following article we concentrate on some of these issues in more detail. At this point we conclude that the responses of jurors to increased PRVTT utilization are most likely to be positive, particularly if the significance of the innovation is clearly explained by the officers of the court at the outset of the trial.

Appendix: Survey of Jurors' Responses to Videotaped Trial Presentation

1. Have you had prior experience as a juror? If so, when and where? Did the prior trials involve videotape procedures?
If so, please elaborate, (e.g., all testimony videotaped; only one witness on tape; etc.)
2. Could you see the television presentation clearly at all times during the trial?
☐ Always
☐ Usually
☐ Seldom
☐ Never
3. If you had any difficulty viewing the television presentation, which of these factors contributed to that difficulty?
☐ not enough monitors
☐ bad viewing distance from screen
☐ poor eyesight
☐ poor quality videotape
☐ other (please describe)
4. Do you feel that you could see the witnesses often and well enough to evaluate their testimony?
☐ saw witnesses well enough
☐ could have been better
☐ was not good enough
5. Did you feel more, or less, involved with the witnesses than you would have, had the trial been live?
☐ more involved
☐ same as live trial
☐ less involved
6. Do you have any comments on the quality of the camera work done in videotaping this trial? For example, should there have been more close-up shots and camera angles, or more split-screen techniques employed?
7. What was your response to the setting in which the testimony was recorded? Do you have any suggestions for change?
8. Do you feel that your assessment of the trial testimony would be improved by use of color television?
9. Did you notice movement of people in and out of the courtroom during the television presentation?
☐ Yes
☐ No
If so, did you find it distracting?
☐ Yes
☐ No
10. In your opinion, is there any difference between a videotaped trial and a

live trial affecting a juror's ability to concentrate on testimony or on the proceedings in general? (Check all the answers that apply).

- ☐ live trial easier to concentrate
- ☐ live trial less confusing
- ☐ videotaped trial easier to concentrate
- ☐ videotaped trial less confusing

11. Would you have preferred to watch the television presentation in a room other than the courtroom?

- ☐ Yes
- ☐ No
- ☐ doesn't matter

If so, why?

12. Did your attention wander during the videotaped portions of the trial?

- ☐ quite a bit
- ☐ somewhat
- ☐ not very often
- ☐ not at all

13. Do you remember wanting any information about the proceedings which was not presented on tape, but which you would have been able to obtain had you been observing a live trial?

- ☐ Yes
- ☐ No

If so, what information?

14. In addition to the television presentation of witnesses' testimony, would you also have liked to see other portions of the trial on television? If so, please check which portions:

- ☐ judge's opening statements
- ☐ judge's closing statements
- ☐ attorneys' opening statements
- ☐ attorneys' closing statements
- ☐ judge's instructions
- ☐ no additional parts taped

15. Please indicate which of these factors, if any, you feel are advantages of videotaped trials. (Check all the answers that apply).

- ☐ less time taken in the courtroom than in a live trial
- ☐ less confusing in the courtroom than during a live trial
- ☐ not as anxiety-provoking for the witnesses as in a live trial
- ☐ easier for jurors to concentrate on testimony than in a live trial

16. Please indicate which of these factors, if any, you feel are disadvantages in videotape trials. (Check all the answers that apply).

- ☐ less emotional for jurors than in a live trial
- ☐ more confusing for jurors than in a live trial
- ☐ more difficult for the jurors to concentrate than in a live trial
- ☐ jurors cannot be as confident about their decisions as in a live trial

17. Please comment on the courtroom atmosphere in this trial compared with other trials at which you served as a juror. (If you have not previously served as a juror, please make a comparison with what you feel courtroom atmosphere ought to be,)

18. In your opinion, did the absence of the judge from the courtroom affect the trial in anyway?

_____ Yes

_____ No

If so, how?

19. In your opinion as a juror, do you think there is any significant difference between a live trial and a videotaped trial?

_____ Yes

_____ No

If so, please comment on the difference or differences.

20. If you were to be involved in a civil court case similar to the case you served on and were offered the choice of a live or a videotaped trial, which would you choose?

Why would you make this choice?

21. If you were an accused in a criminal case, which form of trial would you choose?

Why would you make this choice?

22. Age _____

23. Sex _____

24. Occupation _____

25. Occupation of Spouse _____